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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 179

UNITED STATES FIDELITY & GUARANTY COMPANY, PETITIONER.

vs.

JOHN F. GUENTHER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

C. M. HORN,
Counsel for Petitioner.

(34,310)

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SUPREME COURT OF THE UNITED STATES.

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UNITED STATES FIDELITY & GUARANTY COMPANY, PETITIONER.

vs.

JOHN F. GUENTHER, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, United States Fidelity and Guaranty Company, respectfully represents:

First. That your petitioner is and was at the times herein mentioned, a corporation under the laws of the State of Maryland and a citizen of said state with an office in the City of Cleveland, Ohio, where it is engaged in the general insurance business; that the respondent,

John F. Guenther, is and was at the times herein mentioned, a citizen of the State of Ohio, residing in or near Cleveland, Ohio, and doing business in the City of Lakewood, Ohio.

Second. That on February 15, 1925, your petitioner issued to the respondent an automobile liability insurance policy containing the following provision:

> "This policy is subject to the following conditions: (A) The policy shall not cover any liability of the insured while (the automobile is) being operated by any person under the age limit *fixed by law,* or under the age of sixteen years in any event."

Third. That during the policy period and prior thereto, the following ordinance was in full force and effect in the City of Lakewood, Ohio:

> "It shall be unlawful for any owner, bailee, lessee, or custodian of any motor vehicle, to permit a minor under the age of eighteen years to operate or run said motor vehicle upon the public highways, streets, or alleys in the said City of Lakewood."

Fourth. That thereafter during the policy period and while said ordinance was in effect, the respondent permitted a minor seventeen years of age to operate the respondent's motor vehicle upon the public streets of the City of Lakewood, and while said automobile was being so operated it struck and injured a person who thereafter sued the respondent. The respondent thereupon notified your petitioner to defend said law

suit, but your petitioner, claiming that its policy did not cover said accident because of the driver's age, refused to defend said law suit, whereupon the respondent defended the same at his own expense and paid the resulting judgment, said judgment and expenses amounting to $3,890.62.

Fifth. Thereupon the respondent brought the present action against your petitioner, and your petitioner in its answer set forth the aforesaid policy provision, the ordinance of the City of Lakewood, and the fact that respondent had permitted a minor seventeen years of age to operate his automobile in the City of Lakewood, and that said accident occurred while said automobile was being so operated. To this answer the respondent filed a reply admitting all of the allegations in the answer. Thereafter motions for judgment on the pleadings were filed by the respective parties and the District Court of the United States for the Northern District of Ohio sustained the motion of respondent and overruled the motion of your petitioner and entered judgment against your petitioner and for the respondent for $3,890.62.

Sixth. Thereupon your petitioner was allowed a writ of error to the Circuit Court of Appeals of the United States in and for the Sixth Circuit and a transcript of all the proceedings was duly filed therein, including assignments of error to the effect that said District Court erred in overruling your petitioner's motion for judgment on the pleadings, in sustaining respondent's motion for judgment on the pleadings,

and in entering judgment for the respondent. Thereafter said cause came on to be heard in the Circuit Court of Appeals for the Sixth Circuit before the Hon. Loyal E. Knappen and the Hon. Xenophon Hicks and the Hon. Smith Hickenlooper, and on the third day of April, 1929, said Court (Judge Knappen dissenting) affirmed the judgment of the District Court.

Seventh. That the action and proposition of law involved in this case is substantially as follows:

> "Does the term, 'fixed by law,' as used in the insurance policy quoted from in paragraph Second hereof, include a municipal ordinance, making it unlawful for the owner of an automobile to permit a minor under eighteen years of age to operate it on the public streets of the municipality?"

Eighth. Your petitioner further says that the present case is one in which it is proper for this Court to issue a writ of certiorari for the following reason:

> Because the Circuit Court of Appeals has decided an important question of general law in a way which is probably untenable, in that it held that a municipal ordinance is not a law as that term is used in the policy in question.

Ninth. Your petitioner believes that said judgment of the Circuit Court of Appeals is erroneous and that this Honorable Court should require the cause to be certified to it for its review and determination under the Act of Congress in such cases made and provided.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued under the seal of the Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings in the Circuit Court of Appeals had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court, as provided by the Act of Congress in such cases made and provided, and that said judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and for such other and further relief as may seem proper.

And your petitioner will ever pray.

UNITED STATES FIDELITY & GUARANTY COMPANY,

By C. M. HORN,
Counsel for Petitioner.

THE UNITED STATES OF AMERICA, NORTHERN DISTRICT OF OHIO.

STATE OF OHIO,
Cuyahoga County, ss:

C. M. Horn, being first duly sworn, says that he is of counsel for United States Fidelity and Guaranty Company, the petitioner; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

C. M. HORN.

Sworn to before me by the said C. M. Horn and by him subscribed in my presence this tenth day of June, 1929.

FRED J. PERKINS,
Notary Public.

My commission expires April 6, 1932.

THE UNITED STATES OF AMERICA, NORTHERN DISTRICT OF OHIO.

STATE OF OHIO,
Cuyahoga County, ss:

I, Alton C. Dustin, attorney and counsellor at law, hereby certify that I have examined the foregoing petition for a writ of certiorari; that the same is not made for the purpose of delay, and that in my opinion said petition is meritorious and well founded in law and ought to be granted.

ALTON C. DUSTIN.

Sworn to before me by the said Alton C. Dustin and by him subscribed in my presence this tenth day of June, 1929.

FRED J. PERKINS,
Notary Public.

My commission expires April 6, 1932.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 179

UNITED STATES FIDELITY & GUARANTY COMPANY, PETITIONER,

vs.

JOHN F. GUENTHER, RESPONDENT.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In Ohio, as in many other states of the Union, there is no State statute prescribing the minimum age of operators of automobiles. Thus it is left open for each municipality to prescribe the minimum age by ordinance. The decision of the Circuit Court of Appeals in the case at bar (Judge Knappen dissenting) holds that such municipal ordinances are not laws and are not included within the term "fixed by law" as that phrase is used in automobile liability insurance

policies where coverage is dependent upon the operator being within the legal age.

The widespread effect of the decision of the Circuit Court of Appeals is recognized in the majority opinion, where it is stated that the ruling of the Court "does construe the policy provisions *in use in all the states.*" In other words, the policy involved is a standard-form policy and the provision construed by the courts below is to be found in practically every automobile liability insurance policy in effect in the entire United States. The majority opinion holds that these ordinances regulating the age of drivers are not laws and do not come within the content and meaning of the policy provision "fixed by law." On the contrary, Judge Knappen was of the opinion that these ordinances were laws within the meaning of the policy, and that the minimum age which they prescribe was therefore "fixed by law."

Because of the admittedly widespread effect of this decision, because it construes an important clause in a standard form of policy held by many hundreds of thousands of automobile owners, because the correctness of the holding that municipal ordinances are not laws is challenged by so distinguished a jurist as Judge Knappen and seems at variance with what lawyers generally regard the term "law" as including, we respectfully ask that the petition be granted, so that the question may be settled by the pronouncement of this Court.

1. The commonly accepted meaning of the word "law" includes municipal ordinances.

In *Imperial Fire Insurance Company vs. Coos County*, 151 U. S. 452, the Supreme Court said (p. 463):

> "Contracts of insurance like other contracts are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense."

In determining, therefore, the "plain, ordinary, and popular" meaning of the word "law" as used in the policy, it is entirely proper to refer to the definition of the word "law" as it appears in Webster's New International Dictionary. It is there defined to be—

> "A rule of external conduct or action which is prescribed, or is formally recognized as binding, by the supreme governing authority and is enforced by a sanction. In this sense the term 'law' includes any edict, decree, rescript, order, *ordinance*, statute, resolution, rule, judicial decision, usage, etc., which is made or recognized and enforced by the controlling authority."

It is well known that automobile traffic within municipalities is regulated and controlled largely by ordinances which are known as the traffic laws. Such, for instance, are those ordinances requiring automobilists to stop behind a street car when it is taking on or discharging passengers, to come to a stop before entering a main thoroughfare, to operate their automobiles in a reasonable and careful manner with due

regard for the width and condition of the streets, and others of a similar character. No one would argue that the word "law" in its ordinary, everyday meaning does not include such ordinances, and it is difficult to see why an ordinance making it unlawful for the owner of an automobile to permit a minor under the age of eighteen years to operate the same upon the public streets of a municipality should not likewise be classified as a law as that term is used in the policy in question.

Looking to the legal definition of the term "law," it is defined in Blackstone's Commentaries as—

> "A rule of action which is prescribed by some superior, and which the inferior is bound to obey."

The ordinance in question complies with both of these conditions, and we therefore submit that both in its legal and in its popular definition the word "law" as used in the policy, when properly construed, clearly includes and embraces the ordinance in question.

2. Since in Ohio there is no statute regulating the minimum age of drivers of automobiles, and since municipal ordinances are the only laws upon that subject, the construction adopted by the court below would deprive an important provision of the policy of all meaning and effect, which is contrary to one of the fundamental principles of construction.

It is alleged in the amended reply that "the Legislature of the State of Ohio has never enacted any law fixing the age limit of operators of automobiles."

Hence the only laws regulating the minimum age of drivers of automobiles are to be found in municipal ordinances such as the one in question. The policy does not cover "any liability of the assured while the automobile is being operated by any person under the age limit *fixed by law.*" Therefore, if the term "fixed by law" does not include municipal ordinances, which are the only source of law upon the subject, this important provision of the policy is deprived of all meaning and effect. Such a construction is erroneous because it violates a well-recognized rule of construction. The rule is stated in *2 Cooley's Briefs on Insurance* (2 ed.), p. 963, as follows:

> "Every part of the contract should be considered in arriving at an interpretation thereof, and no part of the words of a policy should be rejected as insensible or inoperative if a rational and intelligible meaning can be given to them, consistent with the general design and object of the whole instrument."

3. The Supreme Court as well as the Circuit Court of Appeals and various State courts have held that municipal ordinances regulating the use of streets are laws and are included within the term "law."

In the opinion of the courts below a distinction was drawn between the laws of the State and the ordinances of a municipality and they held that the term "law" as used in this insurance policy refers only to State laws and does not include municipal ordinances.

We respectfully submit that this view is untenable and that the term "fixed by law" includes all valid

legislation enacted by a legislative body acting within the scope of its powers. However, even if the distinction were valid, it is well established that when a municipality regulates the use of its streets it does so by the authority delegated to it by the State and that its action is therefore Sate action and its ordinances in effect are State laws.

Thus in *Iron Mountain R. Company vs. Memphis,* 96 Fed. 113, the General Assembly of the State of Tennessee had passed a law providing that the City of Memphis should "have and exercise complete and perfect control over all the streets, squares and other property of the city." Thereafter the City of Memphis made a contract with the Iron Mountain Railroad Company, giving it certain trackage rights in said streets which the Railroad Company exercised by the laying of tracks. Subsequently the City of Memphis passed an ordinance declaring said trackage rights forfeited, and the question then arose whether this municipal ordinance was a law of the State of Tennessee which impaired the obligation of the contract between the Railroad Company and the City, and hence violated that provision of the Federal Constitution declaring that no State should pass any law impairing the obligation of contracts. (It was essential to the court's jurisdiction that this be held to be a law of the *State* of Tennessee. See *N. O. Waterworks vs. La. Sugar Co.,* 125 U. S. 18, 30.)

This Court held that the ordinance of the City of Memphis was in fact a law of the State of Tennessee because it was enacted under the general power given

to the City by the Legislature of the State for the control of the streets.

The Court, speaking through Judge Taft, said (pp. 120 *et seq.*):

> "In the control of the streets * * * the city is acting as trustee, not alone for the citizens and residents of the city, but as trustee for the public at large, *and is exercising a power delegated to it by the state and in the exercise of such a power is necessarily therefore a state agency.* * * * It could only use the police force in its governmental capacity as a branch of the state government. * * * With respect to the occupancy of the street however, which it controls by virtue of its being an agent of the state and a trustee for the public, its action in depriving persons having vested property rights in the streets will, if without due process of law, be state action within the inhibition of the Fourteenth Amendment."

In *New Orleans Waterworks Co. vs. Louisiana Sugar Refining Company,* 125 U. S. 18, the Supreme Court, speaking through Mr. Justice Gray, had previously said (p. 31):

> "So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state having all the force of law within the limits of a municipality, that it may properly be considered as a law within the meaning of this article of the Constitution of the United States."

And in *Cumberland Telephone & Telegraph Company vs. City of Memphis,* 198 Fed. 955, in a decision participated in by his Honor Judge Denison, it was said (p. 956):

> "It is well settled that a city ordinance may be considered a law of the state within the meaning of the constitutional provision that no state shall pass any law impairing the obligation of contracts."

These decisions are entirely applicable to the case at bar for the reason that Section 3714 of the General Code of Ohio specifically provides that:

> "Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of the public highways, streets, avenues, alleys * * * within the corporation."

It therefore follows that in enacting the ordinance making it unlawful for any owner of any motor vehicle to permit a minor under the age of eighteen years to operate it on the streets of the City of Lakewood, said city was exercising a power directly conferred upon it by the State of Ohio, and hence its action was in fact and in law the action of the State of Ohio.

In *In re Mutual Life Insurance Company of New York,* 89 N. Y. 530, the Court of Appeals held that a grade fixed by municipal ordinance was fixed by law, saying (p. 533):

> "An ordinance of the Common Council regularly passed and within the scope of the authority conferred upon it by the Legislature is a law. That it is local and not general in its operation does not alter the inherent character or modify its binding effect. *A grade fixed by such ordinance is fixed by law.*"

It has also been held that a person under the age of eighteen years who is operating an automobile, when that is the minimum age fixed by a municipal ordinance, is operating it in violation of law within the meaning of a policy provision to that effect. Thus in *Royal Indemnity Company vs. Stewart,* 172 S. W. 581 (Texas Civil App. 1915), it was held that:

> "Where a city ordinance made it unlawful for any person under eighteen years of age to drive an automobile within the city limits, and plaintiff's automobile while being driven by his sixteen-year-old son ran over and killed a child, a provision of defendant's indemnity policy that it did not cover losses sustained while the automobile was being operated in violation of law was sufficient to protect the insurer from loss on account of the death of the child, and from liability to pay costs recovered of the insured if the ordinance was valid in fact."

If, therefore, municipal ordinances of this kind are to be regarded as laws of the State itself within the meaning of the term "law" as used in the Constitution, how can it be successfully denied that the same ordinance is included within the meaning and content of the term "law" as used in the insurance policy in question? What necessity or what reason exists for

any substantial difference in the meaning and content of the term "law" as used in the two cases? To hold that the word "law" as used in the insurance policy does not include municipal ordinances is to unnecessarily limit its real meaning both in the ordinary and in the legal sense and amounts to saying that that is not law which everyone accepts as law and which is daily enforced as such in our courts, both civil and criminal.

Conclusion.

In conclusion we respectfully submit that the majority opinion of the Circuit Court of Appeals holding that municipal ordinances fixing the minimum age of automobile drivers on the public streets do not come within the term "fixed by law" announces a view which is at variance with the proper construction of that term. We further submit that the correct view is expressed in the dissenting opinion of Judge Knappen, and that an ordinance making it "unlawful" for an owner to permit his automobile to be driven by a minor under eighteen years of age clearly falls within the term "fixed by law."

Because of the widespread effect of the decision as recognized by the Court itself, and because we believe that the view announced is incorrect in law, we respectfully ask that the petition for the writ of certiorari be granted.

Respectfully submitted,

C. M. HORN,
Counsellor for Petitioner.

(8099)